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IN THE

Supreme Court of the United States

October Term, 1941

No. ——

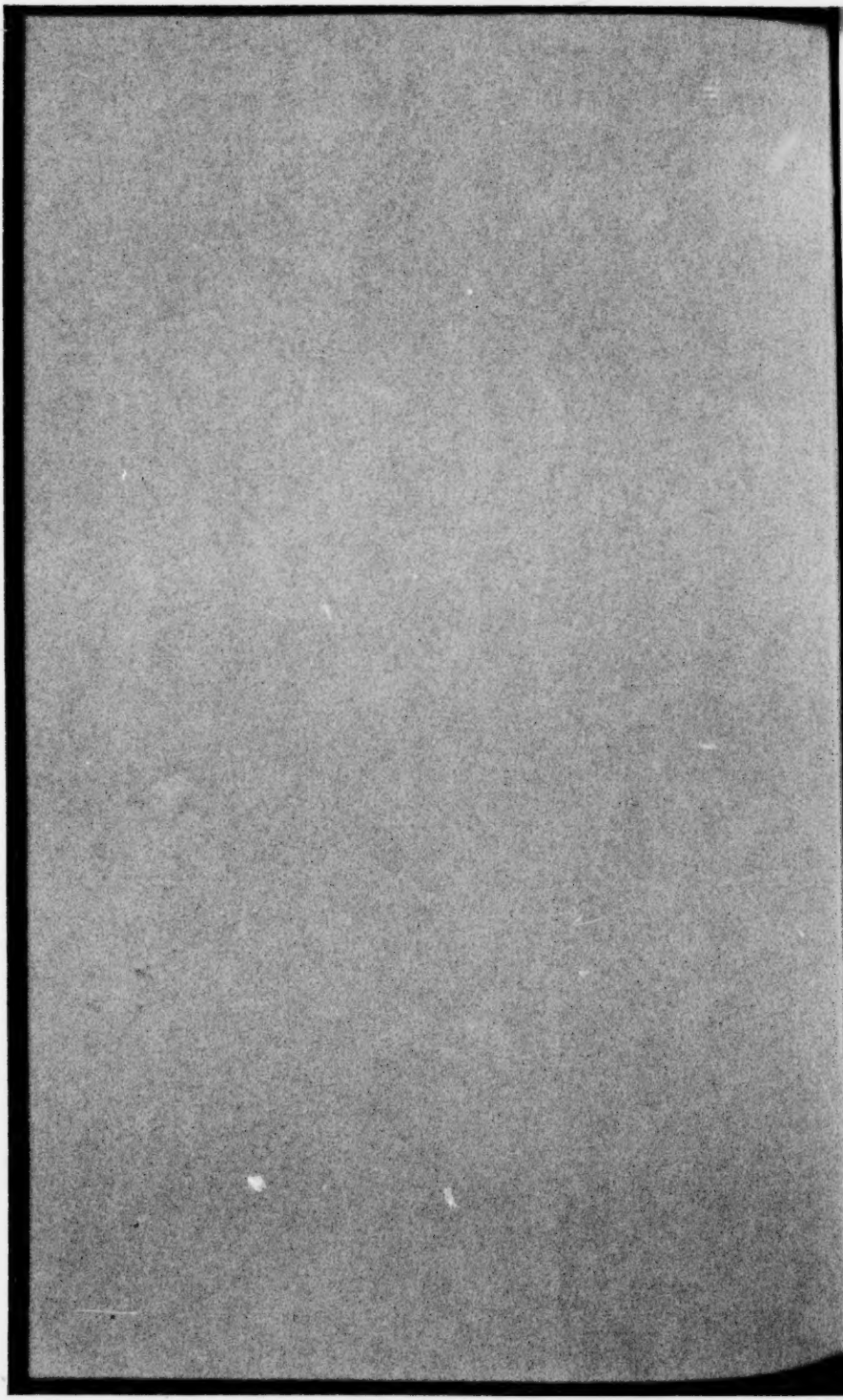
MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INCORPORATED, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPORTING BRIEF



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

YOUR PETITIONER, Maryland and Virginia Milk Producers' Association, a cooperative marketing association organized and incorporated under the laws of the State of Maryland, hereinafter referred to as the "Association" prays that a writ of *certiorari* be issued by this court to review the judgment of the United States Court of Appeals for the District

of Columbia, entered in the above entitled cause on April 21st, 1941, affirming in part a prior decision of the Board of Tax Appeals of the District of Columbia of October 9th, 1939, which decision upheld in part certain assessments of additional taxes made August 19th, 1938 against the Association by the District of Columbia, hereinafter called the District, on intangible personal property for the fiscal years 1936, 1937 and 1938, respectively, aggregating $14,159.46 (R. 13, 15, 17) previously paid under protest in writing, but reducing the same by the amount of $2,534.29 (R. 66), and ordering a refund to that extent, but at the same time imposed additional assessments against the Association for the privilege of doing business in the District in the amount of $16,170.86 during the fiscal year 1938 (R. 77), over and above an additional assessment made under a different theory by the District on August 10th, 1938 (R. 14 and 18) in the amount of $818.71 likewise previously paid under protest in writing September 15th, 1938 (R. 19).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 21st, 1941 (R. 168). The jurisdiction of this court is invoked under Section 347, Title 28, U. S. Code, and Section 975 (a), Title 20, Sup. V. of the Code of the District of Columbia, 52 Stats. 371 C. 223, Sec. 8.

STATUTES INVOLVED.

The statutes involved are as follows: Title 20 of the Code of the District of Columbia, Sects. 752, 753, 754, 757, 758 and 769 authorizing the imposition of taxes on intangibles, and Sections 970 to 970 (15) of Title 6 of the District of Columbia Revenue Act of 1937 D. C. Code 1929 Sup. III, Title 20, authorizing the imposition of Business Privilege taxes by the District, all for the support of that municipality, the pertinent provisions of each of which are set forth in Appendix "A" to this petition.

OPINIONS BELOW.

Neither the opinion of the United States Court of Appeals for the District of Columbia, concurred in by but two of the three sitting members of that court of six (R. 157) nor the dissenting opinion of Chief Justice Groner, the third member sitting, dissenting in part therefrom, (R. 164) has as yet been reported, nor has the decision of the Board of Tax Appeals for the District of Columbia (R. 72) been reported.

FACTS.

The facts out of which this case arose are not believed to be in dispute. The differences are as to the deductions to be drawn therefrom; such deductions of the court below are not binding on this Court. *Sweeney* v. *District of Col.*, App. D. C. 113 Fed. 2nd 25. *Jones* v. *Clark*, 172 N. E. 250, 251. They are believed to be as follows:

The Association is a one-member, one vote, non-profit cooperative marketing association, composed only of farmers producing milk for sale at wholesale through the Association, all resident in Maryland, Virginia and West Virginia. It is incorporated under the cooperative marketing association laws of Maryland, Article 23, Section 469, Code of Public General Laws of Maryland, Section 419 of the Maryland Annotated Code, (Appendix "B") and conforms in respect to its organization, its purposes, its relations with its members, and its membership contracts, in all respects to the definitions and requirements as to such associations, authorized to engage in interstate commerce in U. S. Code, Title 7, Section 291; Title 12, Section 1141 and 1141 (f); Title 12, Section 1141 (j), Sup. IV, in respect to the national policy and the right of farmers to organize such associations and to engage in interstate commerce and make the necessary contracts to that end, as well as to Sects. 103 (1) and (12), Title 20, U. S. Code, exempting them from income taxes [Appendix A]. See form of contract (R. 20-29), and By-Laws (R. 30-43). It is without

capital stock and is organized to serve "only" its members (R. 38). It has, with a single exception, hereinafter pointed out, no source of revenue other than a uniform brokerage not exceeding one cent per gallon maximum, to be charged all producing members based on the actual gallons of milk delivered by and marketed for each member, limited, in no event to exceed said one cent per gallon.

THE GENESIS OF THE REVOLVING FUND.

The contract provides that all expenses of maintaining the Association, including rents, salaries and *reserves* are to be met from this charge, and that any surplus over and above the actual expenditures and reserves are conclusively presumed to be a surplus arising out of the Association's deductions, divided among the members on the basis of the value of the milk delivered by each under said marketing agreement, as a return of the portion of said Association deductions (R. 40 (f)).

By the uniform membership contract (R. 22-29), (paragraph one) (R. 21) each producer "agrees to consign, or have consigned to the Association, or in accordance with its instructions all milk and cream produced" by them severally, on their respective farms. By paragraph two (R. 22) the Association in turn agrees "to sell or dispose of all of the said milk and cream consigned to it or its order, complying with the conditions thereof, to the best advantage in its power * * * and remit the proceeds thereof to the producer less the deductions authorized," subject to the differentials established from time to time under the provisions of pars. three (R. 22) and five (R. 23) thereof, on or about the 15th day of each month all of the purchase money accruing therefrom except the said deductions, with an option authorizing the purchasers of milk to pay the producers direct the proceeds less only the authorized deductions (R. 28-9), on request of the Association. These orders in connection with paragraph 6 (R. 24) recognize the purely agency character of the contract.

Paragraph three of the contract (R. 22) requires the Association to "deduct from the proceeds of all such sales such uniform charges as it makes to other producers * * * necessary to meet its proper proportion of the expenses incurred or to be incurred by the Association, together with such other sums as may be necessary to cover operating expenses * * * of the Association lawfully incurred, as well as to create *reasonable reserves* * * * *reasonably estimated as essential or probably* to be incurred by the Association *pursuant to its constitution and by laws*, provided, however, the total of all *deductions* * * * shall not in the aggregate exceed the rate of one cent per gallon * * * unless such excess be first recommended to the Association by two-thirds majority vote of the Board of Directors and approved by a majority vote of the members of the Association, which authority however the contract also recited had been granted, but limited [See "Note" to the contract (R. 27)] to the creation of an equalization fund, but which authority has never been exercised. All deliveries of milk are made directly by the several producer members at their own expense and risk (R. 111), directly to the purchasing distributors pursuant to contracts made therefor by the Association as their marketing agent.

Up to February 1935 all payments for milk delivered to members under these contracts were always made direct to the producers by the wholesale purchasers thereof under the option aforesaid, less only the one cent brokerage which was paid direct to the Association, as authorized by the orders authorized by par. 6, and appended to each membership contract, and furnished each purchaser, but for reasons of convenience in accounting this method was changed in 1935 (R. 114, 131), since which time the Association has itself collected the entire proceeds of all milk delivered by its members to the purchasers thereof; has deducted its uniform brokerage and remitted the entire net proceeds to its several members in accordance with the terms of the contract, as recited in paragraph five of the contract (R. 24) "to the end that the price received by each producer * * *

shall be substantially uniform with that received by all other producers * * * for milk and/or cream of the same quality produced and marketed at the same time and place under the same circumstances and conditions.

This one cent per gallon brokerage charged each member

> "Is set up to *his* credit and at the end of the year is totaled and given to *his* credit for that particular year, less his proportionate share of the expenses for *that* year; this money called the revolving fund is then invested currently as it is available for investment under the directions of the Board of Directors * * * in securities which are then held in banks in Virginia; most of them * * * in a bank in Richmond, and one in Orange, Virginia, and at the end of each year the interest is added to the revolving fund, and at the end of six years the producer receives back the *unexpended* part of the year's brokerage for the sixth year last preceding in the form of brokerage refund." (R. 87).

The one cent brokerage charge has always been more than sufficient (R. 102) to pay the ordinary day to day, or year to year out-of-pocket expenses of the Association, including the maintenance of "reserves" which all the statutes, state and federal authorize to be maintained as a necessary operating expense. These are essentially contingent and the proper way of distributing this contingent liability among the individual members was accurately solved by providing that such excess brokerage for each year should be retained for cycles of six years each, deemed a sufficient period to insure the ascertainment of all proper charges against the sixth preceding year, and so far as not depleted ad interim by charges properly chargeable to the particular year should be returned to each *individual* member from whom it was retained, whether such individual continued a member or not. This clearly shows that these distributions were not of corporate assets but of individual assets. The contribution having been made on a flat gallonage basis and these records having been preserved the refund was easily and justly made on the same basis without corporate profit or loss of a penny to the Association.

These refunds made directly to members and ex-members "amounted in the last three years respectively to $90,800.00, $109,750.00 and $122,500.00 and were the unexpended part of the brokerage withheld from the members, respectively, in 1930, 1931 and 1932 (R. 87).

These "assets are not the Association's; they are the producer's individual assets" (R. 88). "It would be his—the individual producer's assets in proportion to a participation in the volume of milk delivered to the total volume of milk delivered to the Association" (R. 88). "It is held for the individual" (R. 89). "A record of the amount contributed to the fund during each year by each member, less the expenses for that particular year is kept. * * * We take the total receipts from brokerage during the year, the total expenses, and then at the end of the year we add up that expense, add a percentage of the total receipts and then if there is no depletion of that revolving fund during the next six years, then, of course, he is paid back on that basis" (R. 90).

"It belongs to the members of the Association * * * that is the individual producers. It would be his—the individual producer's assets * * * and that is true regardless of whether or not they both had the same classification. It is held for the individual" (R. 91). "An individual account is kept for each member, kept currently each month, we credit his account and set it up on the card and it is carried right through with the other market information" (R. 100). This is the origin of the so-called "Revolving Fund".

This fund as it existed on July 1, 1935, 1936 and 1937, respectively, consisted of surplus brokerage, accumulated in the years 1929, 1930 and 1931, as added to during the five years following each respective date, and as reduced by the annual disbursements thereof made for the sixth preceding year, and each is clearly a liability and not an asset of the Association. The opinion quotes the auditor's statement that the revolving fund is a statement of the "net" worth of the association, to show it consisted of Association prop-

erty in a legal sense but omits the qualifying and clarifying statement. "The revolving fund is kept so that at any time there would be a complete liquidation, *that amount due the members* would actually balance the revolving fund and nothing left for anybody else" (R. 116).

The Revolving Fund on July 1st, 1935 amounted to $444,007.72 of which $100,500.00 was invested in non-taxable securities, $227,909.94 in corporate bonds and stocks and real estate mortgages on real estate, of which only $19,980.00 were on that day within the District of Columbia. The residue, $115,597.78, was in cash in banks in Maryland, Virginia, and the District of Columbia, of which $33,342.29 was in banks within the District; $6,066.82 was in tangible personal property also returned for taxation and the residue in accounts receivable, of which only $1,639.55 arose from the sale of milk acquired by the Association from others than members (R. 129). The occasional purchase of such milk by the Association from non-members was necessitated from time to time by unforeseen shortages in the production of milk by its members, in order to enable the Association to fulfil commitments previously made to customers (R. 121).

On July 1st, 1936 this Revolving Fund amounted to $526,181.48 (R. 129); of this $4,184.00 was in tangible personal property upon which taxes were paid (R. 16); $145,373.75 in non-taxable securities, leaving only $376,623.03 subject to taxes under any conditions, of which $23,032.50 was in D. C. mortgages and $2,246.87 in district banks, the balance of which was in cash in banks in Maryland and Virginia.

On July 1st, 1937 it amounted to $564,718.99 (R. 56) of which $185,355.95 was invested in non-taxable securities (R. 129), $8,795.00 in tangible personal property upon which taxes had been paid, leaving but $370,068.04 of this fund liable to taxation under any circumstances.

The Board of Tax Appeals adopted these aggregates of the Revolving Fund in the figures stated, but assessed them as if they were all intangibles reduced them only by the

non-taxable intangibles, but failed to reduce them by the amount of tangibles and intangibles previously returned for taxation by the Association, as shown by the original returns. (R. 143 to 155 inclusive).

It was the evident failure of the taxing board in this regard which is responsible for that provision of the sixth paragraph of the majority opinion (R. 164) and the provision in the judgment (R. 168) of the Court of Appeals remanding the cause for further proceedings in conformity with that paragraph (R. 168) but which probably can be settled by stipulation if necessary but which in no event will reduce the judgment of the Court of Appeals by more than $1,000.00.

ACCOUNTS RECEIVABLE FROM DEALERS.

In addition to taxing the entire Revolving Fund not invested in non-taxable securities the Board of Tax Appeals increased the District assessments on the items designated "Accounts Receivable from dealers" for each of the fiscal years involved as follows:

For the fiscal year 1936	$272,924.24	(R. 56)
For the fiscal year 1937	401,918.24	(R. 56)
For the fiscal year 1938	479,080.99	(R. 56)

(a) Prior to February 1st, 1935 no such items appeared on the Association's books because prior thereto these payments for milk delivered the several distributors by the producers were made direct by the distributors to the several individual producers delivering to them (R. 131).

The amounts accruing to each member-producer for the milk so delivered depended entirely upon the quantity and butterfat content of the milk produced by each several producer, respectively, and the premium accruing to each by reason of the scoring of his individual barn and equipment by the health authorities of the District, and the extent to which his individual deliveries of milk equaled or exceeded his pro-rata share of the fluid milk market as previously as-

certained, and assigned during certain test periods during the months of October, November and December of the preceding year.

When the Association took over the collection and distribution of these proceeds, however, as *del credere* agent for its members "purely an accounting change" (R. 114) it became necessary for the Association to set up accounts on its books with the several distributors showing the quantity, quality and disposition of all milk delivered to them daily respectively by each member in order to know how much to collect from each distributor and how to distribute it to its members (R. 114, 131).

Under the contracts between the *del credere* agent and the several distributors (R. 138), subsequent to 1935, "Payment for all such milk or cream" was made "directly to the Association on or before the 10th day of each month for all milk received by the distributor during the preceding calendar month", and under the membership contract (Sec. 2 [R. 22]) the Association was to pay the several members "the proceeds thereof * * * less the deductions * * * mentioned on or about the 15th day of each month".

The result was that on the first day of July of each year (which is the date at which the taxable value of accounts receivable for the next fiscal year are ascertained) there appeared on the books of the Association in addition to the revolving fund these charges against the several distributors for all milk delivered during the preceding month of June, though not due or collectible by the Association prior to the 10th of July.

These are the balances which the District and the Board of Tax Appeals, and the judgment of the court below, held to be assets of the Association, and taxable as such against it under the theory that under the contracts between the Association, and its several members, the Association was the *purchaser* of all milk produced and delivered by its members, and not merely their marketing agent.

(b) In the same way in ascertaining the Business Privilege Tax for the fiscal year 1938, which was based upon

the gross sales made by the Association in the calendar year 1936, the Board of Tax Appeals based this tax upon the gross sales of milk made by the Association as agent for its members during that calendar year, which the Board of Tax Appeals ascertained to aggregate $4,370,206.63 (R. 71), all of which was milk produced by and delivered by its members, except the small quantities procured from sources other than its members, to fulfil prior committments as aforesaid which aggregated but $39,423.43 (R. 71) less than one per cent, and upon which it assessed a total business privilege tax of $17,326.92 in lieu of the $339.35 paid voluntarily by the Association on December 1st, 1937 on such purchases and $818.71 increase made by the District August 10th, 1938, and paid under protest on September 16th, 1938, netting an additional tax of $16,170.86.

None of these increased assessments on Bills Receivable from Distributors, nor business privilege taxes, were made until after the Association had closed its offices in the District, which it did on June 25th, 1938, and removed its administrative offices to Maryland.

The questions involved and determined by the United States Court of Appeals for the District of Columbia, contrary to the contentions of the petitioner, and here brought in question, are as follows:

FIRST: The Association is an agency and not a proprietary Association as determined by the Court below, and is organized not for profit but for service to its members at actual cost as contemplated by the cooperative marketing laws of Maryland, Art. 23 Sec. 419 (b) and 441 Maryland Code Ann. and Virginia, Appendix "B", under which it was domesticated therein and which expressly exempted its reserves from taxation by concurrent Legislation, all as contemplated by the Federal Statutes. (Appendix "A".)

The distinction between profit and non-profit cooperatives, and some consequences thereof, is pointed out by this Court in *Frost* v. *Corporation Commission*, 278 U. S. 515,

523, 72 L. Ed. 483, and adverted to in *U. S.* v. *Rock Royal Corporation*, 307 U. S. 533, 83 L. Ed. 1446, which latter case discusses and justifies the necessity for the differentials provided for in Secs. 3 and 5 of the membership contract. The decision of the Court ignores entirely this distinction and is believed to be contrary to decisions of this court in *Stevens* v. *Baker*, 150 U. S. 312, 316; to decisions of the Circuit Court of Appeals — Circuit in *Edwards Shoe Factory* v. *Stewart*, 107 Fed. 2nd 123, 126, and the Circuit Court of Appeals for the Fourth District in *Eastern Live Stock Corporation* v. *Dickenson*, 107 Fed. (2nd) 116, as well as counter to the great weight of authority, State and Federal, bearing on this point. *Chesterfield* v. *Dehon*, 5 Pick. 7; 16 Am. Dec. 367; *U. S.* v. *Villalonga*, 90 U. S. (23 Wall.) 35, 23 L. Ed. 64, 66; *Larkin* v. *Metcalf*, 202 Fed. 572; 25 C. J. 372; *Davis* v. *Kobe*, 36 Min. 214, 1 Am. St. 663; *Vail* v. *Durrant*, 7 Allan 408; 83 Am. Dec. 695-696.

This question is of great importance not only to the petitioner, but to hundreds, if not thousands of other cooperative marketing associations operating in interstate commerce throughout the United States under similar plans and under the declared policy of the National Agricultural Marketing Act. U. S. Code, Title 12, Sec. 1141, and should be passed upon by this court.

SECOND: That Congress had no power to impose, or authorize the imposition, for the support of the municipal government of the District of taxes against the Association,

(a) On intangibles belonging to its non-resident members and ex-members not located or held in the District of Columbia, but in the temporary custody and control of the Association itself a non-resident without capital or capital stock of any kind, which intangibles came into its possession merely as the marketing agent of its members, all non-residents of the District, and in which assets the Association had no right, title or interest, legal or equitable beyond a right to indemnity therefrom for the actual costs and expenses in-

cident to marketing the product of its members, and hereinafter referred to as the "Revolving Fund",

(b) Nor on other intangibles likewise collectible by, but not yet collected by the Association as their agent, in which it had no right, title or interest of any kind beyond its duty to collect for its members and remit to them pursuant to the provisions of its charter, the membership contracts between itself and its members, its constitution and by-laws, and hereinafter referred to as "Accounts Receivable from Dealers", both classes of which were the result of transactions in interstate commerce between the Association and its members, both in respect to its organization and its relations to its members, which conforms in all respects to the definitions and requirements of such associations authorized to engage in interstate commerce as set out in U. S. Code, Title 7, Section 291; Title 12, Sections 1141, 1141(f) and 1141(j), Sup. V, in respect to the rights of farmers to organize such associations, and to engage in interstate commerce and make the necessary contracts to that end, as well as to Section 103 (I) and (12) Title 20 U. S. Code [*See Appendix "A" hereto*].

The decision of the court below is believed to be contrary to the Fifth Amendment to the Constitution of the United States prohibiting the taking of property for public use without just compensation, and without due process of law, and of Section 8 of Article 1 of the Constitution which requires all duties, imposts and excises shall be uniform throughout the United States, prohibits direct taxation except in proportion to the census and any tax or duty on articles exported from any state and any preference by any regulation of Congress to the ports of one state over those of another (R. 11).

These questions have never been directly passed on by this court, though in some aspects they were presented to this court in *Cohens* v. *Va.*, 6 Wheat 245, 5 L. Ed. 257, which point this court at that time avoided by holding that it was not the intent of Congress in passing the law there in ques-

tion that it should be operative beyond the limits of the District. They were again presented and again passed over on the same ground in *Stoutenburg* v. *Hennick*, 129 U. S. 637, 32 L. Ed. 141, on the same course of reasoning.

The District Court of Appeals in *Beistzell* v. *District of Columbia*, 21 App. D. C. 49, arrived at the same result by the same course of reasoning, which, however, the majority found necessary to disregard in *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2nd) 246, reiterated by the majority decision in this case (R. 164).

THIRD: Assuming that Congress has such power it was not the intent of Congress to impose such taxes on the Revolving Fund by the enactment of Sections 752, 753, 754, 757, 758, 769, Title 20 of the D. C. Code, 1929.

The decision of the Court of Appeals that it was the intent of Congress to impose these taxes on funds belonging to non-residents arising in interstate commerce, and to impose a business privilege tax on transactions in interstate commerce are believed to be contrary to the decisions of this court in *Cohens* v. *Va.*, 6 Wheat 245; 5 L. Ed. 257, and *Stoutenburg* v. *Hennick*, 129 U. S. 637; 32 L. Ed. 141, and of the Court of Appeals of the District itself in *Beistzell* v. *District of Columbia, supra.*

FOURTH: The Association was not carrying on or exercising any business for gain or economic benefit to itself in its corporate identity and therefore was not subject to the Business Privilege Tax within the meaning of Section I Title VI of the District of Columbia Revenue Act of 1937 D. C. Code, Sup III, Section 970 par (d) and was not taxable upon the funds of its principal, of which it was a mere conduit, idem, D. C. Code, Sup III, 970 (d).

The decision of the Court below in this respect is believed to be plainly contrary to the provisions of the law of the District under which it is claimed to be imposed, and to the great weight of authority State and Federal and contrary to the 5th Amendment.

FIFTH: Assuming that Congress did possess power to impose such taxes on the "Accounts Receivable from Dealers" Congress did not by the enactment of the District of Columbia Revenue Act of 1937, Title 20 D. C. Code, Sup III, Sections 970 to 970 (14) intend to impose such taxes on such non-resident corporations so engaged in interstate commerce.

The decision of the Court to the contrary is believed to be contrary to the same decisions cited under the third point, *supra.*

SIXTH: Assuming that Congress did possess such powers to impose such burdens on interstate commerce under the provisions of the District Revenue Act of 1937 the measure of such taxes should have been based not on the gross proceeds of such sales, but on the amount of the commissions or brokerage retainable by the Association from the proceeds of such sales when collected.

Revenue Act for 1937 District Code, Title 20, Section 970 (e) Sup III, expressly provided "The terms gross receipts when used in connection with, or in respect of financial transactions, or in respect of * * * collection of money * * * shall be deemed to mean the gross * * * commission or other gross income earned provided further that in connection with commission merchants, attorneys, or other agents the term "gross receipts" shall be deemed to mean the gross amount of such commission or gross fees deceived by them".

SEVENTH: The Association having made, within the time and in the manner required by law, return of all tangible and intangible property deemed by it liable to taxation within the District for each of the fiscal years 1936, 1937 and 1938, and these returns having been accepted by the proper authorities of the District and taxes assessed thereon by it in accordance with such return, and with law, and the same having been regularly paid before

maturity in due course in each instance the District was without power, after the expiration of the respective fiscal years for which such taxes were assessable, to assess other and additional taxes on its intangibles without notice or demand.

It is practically admitted that under the original provisions of the District of Columbia Revenue Act that all of these assessments made after the expiration of the fiscal year for which they were assessed were void under the ruling of the United States Court of Appeals for the District of Columbia in *Tumulty* v. *District*, 69 App. D. C. 254; 102 Fed. 2nd 716, and *Hunt* v. *The District of Columbia*, 70 App. D. C. 10. The assessment here, however, is sought to be upheld under its supposed amendment by the District of Columbia Revenue Act of 1937, to which both the Board of Tax Appeals and the Court below gave a retroactive effect, contrary, it is submitted, to the great weight of authority on this subject, and contrary to the opinion of the court of Appeals itself. *Neild* v. *District of Columbia*, 71 App. D. C. 306; 110 Fed. 2nd, 246; *Cox* v. *Hart*, 260 U. S. 427; 434; *Big Diamond Mills Co.* v. *U. S.*, 8 Cir. 51 Fed. (2nd) 721; *Anderson* v. *Ritterbush*, 22 Okla 761; 98 Pac. 1002.

The conclusion of the court below is based on *Sturgis* v. *Carter*, 114 U. S. 511, 517, 518. In that case this court but followed the interpretation placed by the Ohio Court upon an Ohio Statute in respect to omitted taxes levied by and due a sovereign.

The taxes here in question are not state taxes against which no limitation can run, but that of a mere municipality against which the limitations do run. *Met. R. R. Co.* v. *District of Col.*, 132 U. S. 1, 7; 32 L. Ed. 231, 234; *Dollar Savings Bank* v. *U. S.*, (19 Wall 227); 22 L. Ed. 80, 82.

It is clear that without legislative authority the District could levy none of these taxes. This was given by Sec. 769, Title 20. But where the same law that grants a right prescribes the time place and manner in which the right is to

be exercised, the method prescribed is exclusive. *Dollar Bank* v. *U. S.*, 19 Wall 227, and if not exercised within the time prescribed it is dead. This is the reason back of *Tumulty* v. *D. C.*, and *Hunt* v. *District of Columbia, supra*, and the basis upon which these attempts were held void and not merely voidable. "When a judgment is declared void, the possibilities of language have been exhausted." *Bray* v. *Landergren*, 161 Va. 713. There is no word or line in either act repealing Sec. 769 or purporting to amend it, nor any expression of a purpose to give it a retroactive operation or to revive a dead right. *Neild* v. *District of Col.*, 71 D. C. App. 306; 110 Fed. 2nd, 246 and cases there cited. *Anderson* v. *Ritterbush*, 22 Okla. 761, 788, and cases there cited. On the contrary the amendment adds penalties not previously existing and as construed constitutes an *ex post facto* law.

EIGHTH: The Association having in compliance with the provisions of the Business Privilege Tax made full report and return of all of its receipts from business conducted within the District of Columbia during the calendar year 1936 as a basis for any business privilege tax arising thereunder, and the District having accepted said return with full knowledge of the facts as disclosed thereby (R. 133-136) and having assessed the taxes accruing thereunder and these having been paid and accepted in due course the District thereafter had no power to assess other and additional business privilege taxes thereon.

The same principles are applicable to this point as those just cited in respect to point seven.

The decision here presented for review it is respectfully submitted is plainly contrary to decisions of this court; to the plain provisions of the statutes under which the taxes are levied and are of great interest to all cooperative marketing associations throughout the United States operating under an agency as distinguished from a proprietary basis, and involve important questions of Federal law which have not been but which should be settled by this court.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisional powers and that the writ of certiorari prayed for should be awarded, and that this case be brought to this court and there reviewed and reversed, as if it had been brought there by unrestricted writ of error or appeal as provided by Section 347 Title 28 U. S. Code and Sec. 975(a) District Code Title 20, Sup. V. 52 Stats. 371 C. 223, Sec. 8, and that such judgment may be entered by this court as should have been entered by the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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